

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

To: The Commission

of “small business,” as set forth in Section 24.720(b) of its Rules, is appropriate for the D, E and F Block auctions.² As presently written, Section 24.720(b)(2) provides that

For purposes of determining whether an entity meets the \$40 million average annual gross revenues size standard [for small business applicants] set forth in paragraph (b)(1) of this section, the gross revenues of the entity, its affiliates, persons or entities holding interest in the entity and their affiliates shall be considered on a cumulative basis and aggregated, *subject to the exceptions set forth in Sections 24.709(b) or 24.715(b).*³

By application of Section 24.709(b)(2), the attribution/aggregation requirement does not apply to a “publicly-traded corporation with widely dispersed voting power.”

Eligibility for the benefits available to small businesses has, quite appropriately in CSCI’s view, been carefully tailored to have “the effect of excluding the large companies that would easily be able to outbid designated entities and frustrate Congress’ goal of disseminating licenses among a diversity of licensees.”⁴ But exceptions were made to the general eligibility restrictions to “afford qualified bidders a reasonable measure of flexibility in obtaining needed financing from other entities, while ensuring that such entities do not acquire controlling interest in the eligible bidders.”⁵

The most widely available exception, the so-called “control group” approach, provides

²*NPRM* at para. 50

³47 C.F.R. Section 24.720(a)(2).

⁴*Fifth Report* at para. 123. To that end, the Commission required that revenues and assets of all of an applicant’s owners, affiliates and owners’ affiliates must be aggregated in determining threshold eligibility (Sections 24.709(a)(1)-(2)). The aggregate gross revenues and total assets of CSCI and its affiliates fall well under the maximum levels specified in Sections 24.709(a) and 24.720(b); however, if the assets and revenues of CSCI’s owners and its owners’ affiliates are aggregated with those of CSCI and its affiliates, the combined total would likely well exceed the Entrepreneurs’ block limits.

⁵*Fifth Report*, at para. 159.

that certain owners' and affiliates' gross revenues and total assets will not be attributed to the applicant if qualifying entities (the so-called "control group") possess both *de jure* and *de facto* control of the applicant (as defined by certain threshold ownership and voting tests) and an appropriate level of equity ownership to assure their meaningful participation in the organization.⁶ However, the Commission separately recognized that this control group concept would not be a practical approach for some widely held companies. Section 24.709(b)(2) therefore provides a separate exemption from the attribution/aggregation requirement for "publicly-traded corporations with widely dispersed voting power", as defined in Section 24.720(m).⁷

The Rules originally adopted in the *Fifth Report*⁸ did not allow such a publicly-traded applicant to ignore its affiliates' and owners' revenues and assets unless it could identify a "control group" of owners who held at least 25% of the equity and 50.1% of the voting interests in the applicant. On reconsideration of the *Fifth Report*, Metricom, Inc., a publicly-traded small

⁶Sections 24.709(b)(3) and (b)(5).

⁷A "publicly-traded corporation with widely dispersed voting power," is a business entity organized under the laws of the United States:

- (1) Whose shares, debt, or other ownership interests are traded on an organized securities exchange within the United States;
- (2) In which no person (i) owns more than 15 percent of the equity; or (ii) possesses, directly or indirectly, through the ownership of voting securities, by contract, or otherwise, the power to control the election of more than 15 percent of the members of the board of directors . . . ; and
- (3) Over which no person other than the management and members of the board of directors . . . exercises *de facto* control.

⁸PP Docket No. 93-253, *Fifth Report and Order*, FCC 94-178, released July 15, 1994 (the "*Fifth Report*")

business very similarly situated to CSCI, noted serious concerns with that rule as it would apply to companies like Metricom whose ownership was widely disbursed.⁹

Metricom duly feared that “the attribution rule [as then limited] renders ineligible for ‘entrepreneurial business’ status every publicly-traded corporation whose voting stock ownership is dispersed enough to make it impractical to identify a ‘control group’ of shareholders who holds 50.1% of the corporations’s voting stock.”¹⁰ As Metricom noted, the practical impact of the “control group” requirement of the *Fifth Report* would be to deny eligibility to a myriad of the types of small, entrepreneurial enterprises whose very participation the Commission (and Congress) was trying to encourage by providing a special block of limited eligibility licenses and economic preferences. A “control group” concept might be a commendable solution to prevent abuses involving large entities effectively masquerading as smaller ones in order to gain the benefits intended for new entrants. But making it the “sole” method of avoiding aggregation of affiliates and shareholders revenues and assets for purposes of gauging an applicant’s size and capital-raising power was simply too limiting.

Metricom therefore proposed an alternative for those publicly-traded companies with widespread voting share ownership and no controlling affiliates. And in the *Fifth MO&O* the Commission acknowledged, and generally adopted Metricom’s suggestion to create the current exemption in 24.709(b)(2). As the FCC noted, “it was not the Commission’s intent that [small business entities like Metricom] should be denied the opportunity to bid on the entrepreneurs’

⁹Letter from Henry Rivera to Sara F. Seidman, Esq., October 20, 1994, PP Docket No . 93-253.

¹⁰*Id.*, at p.7

block, or to qualify for treatment as a small business.”¹¹

CSCI is a prototype of the small business entity for which this “publicly-traded corporation” exemption was developed. CSCI, a Maine corporation located in Winthrop, Maine, is the holding company for Community Service Telephone Company, a local exchange telephone company operating several small exchanges in rural Maine, and its affiliated service organizations. CSCI is, in every sense of the word, a publicly-traded small business with widely distributed ownership. Over the last three years (1992-1994), its consolidated gross revenues, which include *pro rata* distributions from its cellular holding, have averaged less than \$12 million. Its consolidated attributable assets, including its *pro rata* interest in its cellular holding, are less than \$14 million. The company currently has over 360 shareholders, and to the best of the company’s knowledge, only three shareholders hold more than 5% of the company’s stock.¹² The Frank S. Southard Jr. Residuary Trust currently holds approximately 17.1% of CSCI’s common stock; GEM Industries holds about 6% of the stock; and John W. Connor, a former officer and currently a Director, holds approximately 5.6% of the stock. The balance of the stock is widely disbursed among the remaining 360 plus shareholders.¹³ No shareholder has any

¹¹*Fifth MO&O*, at para. 73.

¹²Because securities laws protect the identity of stock held in “street name” by the owners’ brokers, CSCI has no way of knowing exactly who owns each share, but its due diligence suggests that only the three listed shareholders own blocks of stock larger than 1%.

¹³Shares of CSCI’s stock are traded by the public through registered securities brokers, as a so-called “pink sheet” stock. In order to purchase CSCI stock, a member of the public calls a registered broker, who can identify from the pink sheets the then current “bid” or “ask” price for the stock and the broker/dealers who are “making the market” for the stock; the transaction would be consummated without further filings or registration with any federal or state agency regulating the sale of securities. While shares of CSCI do not necessarily trade on a daily basis, on average, 2-6% of the stock, representing from 5-15% of the stockholders, changed hands during the last three years. The stock has been registered with the Securities and Exchange

unique rights relating to the election of any one or more directors, and there are no cumulative voting privileges. No shareholder has the power, directly or indirectly, to direct or control the election or any particular number of directors.¹⁴

Moreover, no person other than the management and the members of the Board of Directors (all of whom are elected by the majority of the shareholders) exercises *de facto* control over the company. In fact, CSCI is not controlled in any way by any individual shareholder or group of shareholders, well-financed or otherwise. Rather, in CSCI's widely dispersed ownership structure, no one shareholder or group of shareholders exercises control. Like many other publicly-traded companies, CSCI is controlled by its corporate management. The Commission's recognition that such widely held stock companies do not need to identify a "control group" to avoid the undue influence of well-heeled investors applies in every sense to CSCI. Nevertheless, CSCI does not qualify for this exemption because one of its shareholders, the Southard Trust, is deemed to hold more than 15% of its stock.¹⁵

The Commission must facilitate greater participation in its broadband PCS auctions by true "small businesses" like CSCI, and thereby promote the Commission's goal of ensuring that

Commission in the context of a stock reorganization that occurred when CSCI was created as a holding company for its various operating subsidiaries. However, because of the size of CSCI, including its various subsidiaries, the company is not required to make quarterly or annual filings with the SEC.

¹⁴In actuality, nominations for the Board of Directors are developed by a committee of the current board, and then proposed as a slate to the shareholders, who have generally confirmed the nominated slate on a *pro forma* basis.

¹⁵This is truly a "technical violation," resulting from the Commission's view that stock interests held in trust will be deemed controlled by any person who holds or shares the power to vote such stock. 24.720(l)(6) In reality, however, each of three beneficiaries of the trust share equally in the trust assets.

publicly-traded corporations not be disadvantaged in the bidding process relative to similarly-situated non-publicly-traded businesses.¹⁶ To that end, CSCI submits that any limitation on a single entity's ownership in such a widely held entity is superfluous in light of the other requirements of the Rule, which, in total, are intended to identify the power to control the company. Legal or beneficial owners of large blocks of equity without power to control election of a large share of the Board of Directors or otherwise to control the company's affairs do not present problems of influence and unfair participation in a designated entity. Indeed, the standard intended to identify circumstances where any one individual has the power to control election of a substantial part of the Board of Directors would appear to provide all of the protection needed against undue control, without requiring small, publicly-traded entities to spend the time and resources to identify larger owners without such power.

Ironically, the very exemption intended to encourage participation in the auctions imposes such hardships when one owner holds only 15% of the equity, while entities with a "control group" structure may invite as many as three "passive" owners to hold equity and voting rights of up to 25%.¹⁷ The 15% single entity ownership limitation in the definition of a

¹⁶The Commission has expressed particular concern that its Rules not impose hardships on publicly-traded businesses, in part because they have little control over the ownership of their stock. *See Fifth Report* at para. 163.

¹⁷The 15% limitation was initially adopted as part of the original entrepreneurs' block Rules in the belief that 15% ownership in a publicly-traded company would presumptively create a control problem. But even in that context, the Commission expressly noted that "in the event that a publicly-traded company can demonstrate that the 15 percent threshold would impose a serious hardship, the Commission would entertain request to raise the threshold in individual cases. *Companies seeking such relief must also demonstrate that raising the threshold would not contravene the Commissions' control objectives.*" *Fifth Report & Order* at [¶ 163, n141](emphasis added) While the Commission has subsequently amended its position as to the level of equity and voting influence that a passive investor in a "control group" context may

widely held company simply no longer has any place in the Rules.¹⁸ Rather than protect the integrity of the auctions from deep-pockets, the 15% ownership restriction has, and in the D, E, and F auctions will, keep widely held, publicly-traded, true small businesses out of the auction.

CSCI also requests that the FCC confirm that the term “organized securities exchange” in Section 24.720(m)(1) includes “pink sheet” trading of its stock¹⁹. Alternatively, the Commission should simplify this definition by deleting the requirement that shares be traded on an organized securities exchange in favor of a test that requires that “shares, debt, or other ownership interests are publicly traded through registered securities brokers”. For CSCI and many other small corporations, registration on a nationally recognized organized exchange (*i.e.*, the NYSE, AMEX or NASDAQ), or even on some of the smaller regional exchanges, is not an economic or practical option. Indeed, it is for this very reason that “pink sheet” trading had developed among brokers/dealers for localized, smaller company issues. By confirming that the term “organized exchange” goes beyond the national and regional stock exchanges and includes “pink sheet” trading, the Commission would merely recognize that the term “publicly-traded” will not be limited to those larger entities whose significant capital raising potential has provided them with

hold, it has not done so in the context of widely held public companies.

¹⁸At the very least, the limitation should be raised to 25%, to be consistent with the passive equity limits allowed to individual entities under the “control group” structure.

¹⁹The Barron’s Financial Guides, Dictionary of Finance and Investment Terms (3rd Ed., 1991), defines the “pink sheets” as the “daily publication of the National Quotation Bureau that details the bid and asked prices of thousands of over the counter (OTC) stocks. Many of these stocks are not carried in daily OTC newspaper listings. Brokerage firms subscribe to the pink sheets -- named for their color -- because the sheets not only give current prices but list market makers who trade each stock.”

the opportunities for such listings.²⁰ Alternatively, and to avoid even this level of determination, the rule can be just as adequately policed, and its purposes even better served, by simply requiring that the company's shares be "publicly traded through registered securities brokers", thereby distinguishing those companies whose stock is, in fact, privately and closely held from those for which the rule's benefits are intended.

WHEREFORE, Community Service Communications, Inc. urges the Commission to use the opportunity provided by the *NPRM* to adopt a more appropriate definition for the term "publicly-traded companies with widely dispersed voting power," in accordance with the comments herein.

Respectfully submitted,

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April 15, 1996

²⁰The primary purpose of the "publicly-traded" requirement is to distinguish those companies in which the public may freely buy and sell interest from those that are closed to the public and primarily funded through private capital. CSCI's stock is freely transferrable by and to members of the public. In fact, much of CSCI's stock is held by brokers in street name, *i.e.*, in the name of the broker rather than the name of the investor, in order to make trades in the stock more flexible. Furthermore, like a corporation whose stock is sold in the NYSE, NASDAQ or AMEX, CSCI has no control over who purchases its stock.